IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.968 OF 2002

IN

ARBITRATION PETITION NO.290 OF 1996

...

Oil & Natural Gas Corporation Ltd. ...Appellants

v/s.

M/s.Geological Technologies ...Respondents

...

Mr.Gaurav Joshi with Mr.Prakash Shinde i/b M.Dhruva & Co. for the Appellants.

Mr.S.U.Kamdar, Sr.Counsel with Mr.S.Nagvadaria i/b M/s.Mehta & Co. for the Respondents.

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CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 31ST OCTOBER, 2007

P.C.:

1. By this Appeal, the Appellant challenges the

order dated 18th July, 2001 passed by the learned single Judge of this court in Arbitration Petition No.290 of 1996. That petition was filed by the Appellant challenging the award dated 14th September, 1995 under Section 30 of the Arbitration Act, 1940. Against the same award, Arbitration Petition No.15 of 1997 was filed by the present Respondent. Both these petitions were disposed by by common order dated 18th July, 2001. The learned single Judge dismissed both the petitions. It is common ground that the Respondent has not challenged the order and has accepted the award. It is only the present Appellant who has challenged the order.

2. Challenge to the award made by the learned arbitrators is that as per the modified clause 12(8) of the contract, if there is increase in the rate of custom duty, payment at the increased rate was to be made by the Appellant-ONGC and if the rate of custom duty remains the same, but more amount is required to be paid because of fall in the exchange rate of Rupees then the ONGC is not liable.

3. In this case, it is an admitted position that the rate of custom duty has remained the same. But more

amount was required to be paid because there was fall in the exchange rate of Rupee. The Arbitral tribunal has accepted that under clause 12(8) of the agreement which was modified, even if there is increase in the amount of custom duty not because of variation in the rate of custom duty, but because of fall in exchange rate of rupees, still it is the Appellant which will be liable. That finding has been confirmed by the learned single Judge.

4. We have heard the learned Counsel appearing for the Appellant in detail and we find that reading clause 12(8) of the agreement between the parties, it is clear that even if the amount of custom duty increases not because of any variation in the rate, but because of fall in the exchange rate of rupee, still it is the Appellant which will be liable and not the contractor.

5. One more submission on the basis of the recital in the clause 12(8) was made on behalf of the Appellants and it is that if there is delay in deployment of the equipments by the contractor, then any increased liability as to custom duty from the period of agreed date of deployment or scheduled date

of deployment and the actual date of deployment is to be born by the contractor. The Arbitrators have rejected this contention by holding that there is no real delay in deployment of the equipments. The arbitrators construed two clauses of the contract. First clause regarding mobilisation and other regarding payment of custom duty. The arbitrators have held that it was compulsory under Clause 12(8) for the contractor to import the equipments at the concessional custom duty rate of 30% and the import could be made under that rate only against the issuance of essential certificate by OIDB, and therefore, the contractor imported the equipments within the stipulated period of 30 days from the date of issuance of essential certificate by the authorities, and therefore, as there was no delay on the part of the contractor in deployment in terms of the contract, there is no liability on the contractor. The learned Counsel for the Appellant submits that the construction placed by the arbitrators amounts to modification of the contract. He submits that the contract cast liability on the contractor to mobilise two equipments within 30 days from the date of signing of the contract. According to him, it was not necessary for the contractor to

wait for issuance of the essential certificate. In any case, if there was any delay in issuing essential certificate, the delay was attributable to the contractor and therefore, the Appellant cannot be held responsible for the delay.

6. In our opinion, though clause regarding mobilisation obliged the contractor to mobilise within a stipulated period from the date of signing of the contract, Clause 12(8) clearly obliges the contractor to import the equipments only at the concessional rate of custom duty and it is common ground that the concerned rate was available only if there is an essentiality certificate issued by the Government agency. In our opinion, it was reasonable reading of the term of the contract to say that the delay is not attributable to the contractor. In any case, if there was undue delay caused by the contractor, clause 12(8) contemplated that deployment can be made by the contractor in case of delay only with prior approval of the Appellant. Thus prior approval has admittedly been given by the Appellant. This conduct of the Appellant shows that the delay in deployment is not attributable solely to the contractor. In our opinion, reading of the various

clauses of the contract by the arbitrator is a reasonable reading of the contract. Therefore, we do not find any error in the award made on that count and therefore, in our opinion, the learned single Judge was justified in rejecting the challenge.

7. The last submission that is made on behalf of the Appellant is that by the award the arbitrators have awarded interest for the period anterior to 3-2-1994. In the award, the arbitrators themselves have stated that the statement of claim was filed on 3-2-1994 and that is the date on which the arbitrators entered the reference. The submission on behalf of the Appellant is that there was no contract between the parties for payment of any interest, and therefore, the arbitrators will not get power to award interest for the period before entering the reference.

8. The only submission made by the Respondent on this count is that such contention was not raised before the learned arbitrators.

9. In our opinion, even assuming that such a contention was not raised before the learned arbitrator, it is clear that in the absence of any

contract between the parties for awarding of interest for pre-reference period and in the absence of notice being given under the Interest Act, the arbitrators will not have jurisdiction to award interest for the period before he enters the reference and therefore in our opinion, the award in so far as it awards interest on the amount payable to the contractor for the period before 3-2-1994 is liable to be set aside.

10. In the result, therefore, the appeal succeeds in part and is allowed. Only that part of the award, made by the learned arbitrators, awarding interest on the amount found due to the Respondent for the period before 3-2-1004 is set aside. The award made by the arbitrator is modified to that extent only. The decree passed by the learned single Judge in terms of the award shall also stand modified to that extent.

11. Out of the money that has been deposited by the Appellant/Respondent shall be entitled to withdraw only that much money to which the Respondent is entitled under the modified decree and the Prothonotary & Sr.Master shall permit that withdrawal only after a period of eight weeks from today.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)